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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 429

D. GINSBERG & SONS, INC., PETITIONER,

vs.

JOSEPH POPKIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 1, 1931

CERTIORARI GRANTED NOVEMBER 2, 1931

(36,243)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1931

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

M13-320

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt

ORDER TO SHOW CAUSE

Upon the annexed affidavit of Joseph Popkin, duly verified the 8th day of December, 1930, upon the petition of D. Ginsberg & Sons, Inc., dated the 4th day of December, 1930, presented to this Court, and the ancillary order of Judge Goddard, granted thereon bearing date the 4th day of December, 1930, which said papers are now on file in the office of the Clerk of this Court, and upon all the proceedings heretofore had herein.

Let D. Ginsburg & Sons, Inc., or its attorney, Leo J. Linder, Esq., show cause before me at a stated term of this Court for the hearing of motions to be held at the Courthouse thereof in room 235 in the old Post Office Building, Park Row, in the Borough of Manhattan, City of New York, on the 10th day of December, 1930, at 10:30 in the forenoon of said day or as soon thereafter as counsel can be heard, why an order should not be made quashing, vacating, set-
[fol. 2] ting aside the ancillary order of ne exeat granted by Judge Goddard on the 4th day of December, 1930, under which Joseph Popkin was apprehended, and vacating and setting aside the provision of said order directing said Joseph Popkin to appear and be examined before Oscar W. Ehrhorn, Esq., as Special Commissioner, and for such other and further relief as to this Court may seem just and proper, and in the meantime, and until the hearing and determination of this motion, the said D. Ginsburg & Sons, Inc., and said Leo J. Linder, Esq., as its attorney, and the said Oscar W. Ehrhorn, Esq., as Special Commissioner, be and they hereby are stayed from further proceeding with the examination of said Joseph Popkin.

Sufficient reason appearing therefor, let service of a copy of this order and the papers upon which the same has

been granted, upon Leo J. Linder, Esq., attorney for said D. Ginsburg & Sons, Inc., on or before the ninth day of December, 1930, at 10:30 o'clock A. M., be deemed good and sufficient service.

Dated New York, December 8th, 1930.

Woolsey, United States District Judge.

[fol. 3] In United States District Court, Southern District of New York

[Title omitted]

Petition of Joseph Popkin, Submitted in Support of Order to Show Cause Made December 8, 1930

State of New York,
County of New York,
Southern District of New York, ss:

Joseph Popkin, being duly sworn, deposes and says:

That the Foster Construction Corporation, the bankrupt above named, was duly adjudicated a bankrupt in the United States District Court for the Eastern District of New York prior to the 1st day of July, 1930, and a trustee of said bankrupt was duly appointed and qualified about the 1st day of July, 1930, as your deponent has been informed and verily believes. That no ancillary receiver or trustee in bankruptcy has been appointed for said bankrupt in this District, and that there are no ancillary proceedings pend-
[fol. 4] ing in this District except the one hereinafter referred to.

That upon the petition of D. Ginsburg & Sons, Inc., verified the 4th day of December, 1930, an alleged creditor of the above named bankrupt, Judge Goddard, on the 4th day of December, 1930, granted an ancillary order for the examination of your deponent and issued an order of ne exeast therein under which your deponent was taken into custody by the United States Marshal of this District, and thereafter released upon furnishing a bond in the sum of $10,000.00 as in said order provided. That under the order of Judge Goddard aforesaid, your deponent was directed to appear before Oscar W. Ehrhorn, Esq., who was designated as Special Commissioner herein to be examined con-

cerning the acts, conduct, and property of the above named bankrupt. That your deponent appeared before said Special Commissioner on the 6th day of December, 1930, with his counsel, Louis Jersawit, Esq., and through his counsel asserted that the said Commissioner was without power to hear and proceed with the examination of your deponent as Judge Goddard was without power, authority or jurisdiction to make the aforesaid order of ne exeat, but was overruled by said Commissioner, and the further hearing adjourned until December 9th, 1930.

That as your deponent has been advised by his said counsel and verily believes, Judge Goddard was without power, authority or jurisdiction to make or grant the an- [fol. 5] cillary order of ne exeat aforesaid for the reason that the petition of D. Ginsburg & Sons, Inc., the alleged creditor of the above named bankrupt, was insufficient upon the face thereof to warrant the issuance of said order of ne exeat, or the order that your deponent appear for examination before such Special Commissioner.

That your petitioner makes the present application to quash, vacate, and set aside the said ancillary order of ne exeat herein and to vacate the order directing the examination of your deponent before said Special Commissioner, upon the papers upon which the same was granted, as it affirmatively appears therefrom that Judge Goddard was without power, authority or jurisdiction to grant said ancillary order of ne exeat.

That the said D. Ginsburg & Sons, Inc., was represented on the application for the said ancillary order of ne exeat aforesaid by Leo J. Linder, Esq., as its attorney, and upon whose motion the said order was granted.

Wherefore your deponent respectfully asks that an order be made directing said D. Ginsburg & Sons, Inc., or Leo. J. Linder, as its attorney to show cause why an order should not be made quashing, vacating and setting aside the said ancillary order of ne exeat granted by Judge Goddard on the 4th day of December, 1930, and vacating the order for the examination before the Special Commissioner, and for [fol. 6] such other and further relief as may be just and proper in the premises. That the reason an order to show cause is asked for instead of giving the usual notice of motion is that this motion cannot be heard before the adjourned day of the hearing before the said Special Com-

missioner, and that your deponent desires a stay of all obey and comply with the lawful orders and decrees of the hearing and determination of his present motion, for which no previous application has been made.

Joseph Popkin.

Sworn to before me this 8th day of December, 1930.
Morris Katz, Notary Public, N. Y. Co.

[fol. 7] In United States District Court, Southern District of New York

[Title omitted]

Ancillary Order for Examination and Order of ne Exeat—Dated December 4, 1930

Upon the petition of D. Ginsberg & Sons, Inc., duly verified, and it appearing that an involuntary petition in bankruptcy has been filed and is now pending against the said Foster Construction Corporation in the United States District Court for the Eastern District of New York, and that the petitioner is a creditor of the bankrupt corporation, and that the petitioner is, under the circumstances set forth in the petition herein, a proper party to make this [fol. 8] application, and that said petitioner has been duly authorized to apply to this court for an order of examination of certain witnesses within the jurisdiction of this court and for an order ne exeat, and that it is proper and necessary in aid of the said petitioner that an ancillary order for the examination of said persons issue and that an order ne exeat issue,

Now, upon motion of Leo J. Linder, attorney for said petitioner, it is

Ordered, that the prayer of said petition, be and hereby is granted and an ancillary order of examination in aid of said petitioner as creditor of said bankrupt issue, and it is further

Ordered, that Joseph Popkin appear before Oscar W. Ehrhorn, Esq., who is hereby appointed Special Commissioner for that purpose at a time and place to be designated by him and be examined concerning the acts, conduct and property of the said bankrupt; and it is further

Ordered, that the United States Marshal for the Southern District of New York, or any of his deputies, be, and he is hereby commanded that, without delay, he apprehended and take into custody Joseph Popkin, an officer of the bankrupt corporation above named, and bring him forthwith before me for examination, or, at his option, cause him to give sufficient bail or security in the sum of [fol. 9] $10,000 to be approved by this court, or the Clerk thereof, that he, the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial jurisdiction of this court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the court herein for his examination, which shall or may be made on behalf of the said petitioner or other creditors of the said bankrupt.

Henry W. Goddard, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION OF D. GINSBERG & SONS, INC., SUBMITTED ON APPLICATION FOR ORDER

To the United States District Court for the Southern District of New York:

The petition of D. Ginsberg & Sons, Inc., shows:

[fol. 10] 1. That your petitioner is a creditor of the above named bankrupt, having duly filed its proof of claim herein in the sum of $14,958.15.

2. That on the 23rd day of September, 1929, a petition in bankruptcy was filed against the above named bankrupt in the United States District Court for the Eastern District of New York, and thereafter Foster Construction Corporation was duly adjudicated a bankrupt in said court.

3. That Joseph Popkin is the president of the bankrupt corporation and he has withdrawn and failed to account for more than $100,000.00 of the cash funds of the bank-

rupt corporation. Joseph Popkin has never been examined in the bankruptcy proceedings hereinabove referred to. In 1929, Joseph Popkin fled to Canada to avoid arrest and remained out of the jurisdiction until such time as he believed his creditors had been placated into not taking any action against him. On January 27, 1930, a ne exeat order was made by the United States District Court for the Eastern District of New York commanding the United States Marshal for the said district to take Joseph Popkin into custody, but Joseph Popkin again fled the jurisdiction of the United States District Court for the Eastern District of New York, and in spite of the strenuous efforts made by your petitioner and other creditors, no trace could be found of him. Your petitioner discovered a few days ago that Joseph Popkin had come back to Greater [fol. 11] New York and applied for and procured an order yesterday, December 3, 1930, made by Honorable Robert A. Inch, District Judge, commanding the United States Marshal for the Eastern District, to arrest Joseph Popkin or cause him to give bail in the sum of $10,000.00. That officers of your petitioner, with a Deputy United States Marshal of the Eastern District proceeded to Manhattan yesterday afternoon upon ascertaining that he was in an office building in Manhattan, and followed him from an office building in Manhattan to Jersey City, where Joseph Popkin apparently went to spend last night. Your petitioner believes that Joseph Popkin is aware that he is being hunted and that he has fled to Jersey City believing that he was safe there. Your petitioner does not know whether Joseph Popkin will return to New York City or will return to Jersey City, but believes it imperative that an order directing his examination and directing a United States Marshal for this district to take him into custody is necessary. Your petitioner believes that if Joseph Popkin is not apprehended immediately that he will again run away and leave the United States as he did before.

4. This application is made by your petitioner instead of by a trustee in bankruptcy, who was appointed herein in June, 1930, because the trustee in bankruptcy, who was appointed herein, is Benjamin Kronenberg, an attorney, who at one time represented the bankrupt corporation, and [fol. 12] who, your petitioner believes, is friendly with

Joseph Popkin. The trustee in bankruptcy was elected over the objection of your petitioner and various other creditors, which objection was specifically grounded on the impropriety of his serving as trustee by reason of his relations with the bankrupt corporation, but that, nevertheless, in spite of this objection, Benjamin Kronenberg was appointed trustee by virture of the votes of certain creditors, including creditors who had at one time been personally represented by the same Mr. Kronenberg. That your petitioner believes that it would endanger the interests of creditors to even notify Mr. Kronenberg of this application.

5. That Joseph Popkin's testimony is material and necessary in aid of the petitioner as to the acts, conduct and property of the bankrupt, and that Joseph Popkin was in a number of office buildings yesterday in the Borough of Manhattan, apparently transacting some business there, and your petitioner believes that he may be found in the Borough of Manhattan some time today. Your petitioner further states that Joseph Popkin slept last night in a residence in Jersey City, and that he may appear again in Jersey City some time during today or this afternoon. That Joseph Popkin will unquestionably leave the jurisdiction of this court and, in all probability, leave the jurisdiction of the United States for a third time if he is not apprehended immediately.

[fol. 13] 6. That ancillary proceedings to obtain this order of examination and ne exeat order are necessary in this District, and on the 4th day of December, 1930, the United States District Court for the Eastern District of New York, by an order entered therein, duly authorized the petitioner to apply to this court for an ancillary order of examination and order of arrest.

Wherefore petitioner respectfully prays for ancillary proceedings in this district in aid of petitioner and for an order for the examination of Joseph Popkin before a referee or special commissioner to be appointed in this district concerning the acts, conduct or property of the bankrupt herein, and for an order commanding the United States Marshal, or any of his deputies, for this district, to

apprehend and take Joseph Popkin into his custody, and for other and further relief as may be necessary.

Dated December 4, 1930.

D. Ginsberg & Sons, Inc., by Dora Ginsberg, Petitioner.

[fol. 14] *Duly sworn to by Dora Ginsberg. Jurat omitted in printing.*

[fol. 15] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

WRIT NE EXEAT, MADE DECEMBER 4, 1930

To the United States Marshal for the Southern District of New York or any of his deputies:

Whereas, it appears that an order of the United States District Court for the Eastern District of New York has been made by Honorable Robert A. Inch, District Judge, on the 4th day of December, 1930, authorizing and empowering application for an ancillary order of examination of certain necessary witnesses, and for orders ne exeat directed to the Marshals for the Southern District of New York and for the District of New Jersey; and

Whereas, it appears to the satisfaction of the United States District Court for the Southern District of New York, sitting in bankruptcy, on the order of the United States District Court for the Eastern District of New York, dated December 3, 1930, made by Honorable Robert A. [fol. 16] Inch, District Judge, on the petition of D. Ginsberg & Sons, Inc., duly verified, and on the order previously made herein by Honorable Mortimer W. Byers, District Judge, dated January 27, 1930, and the papers upon which the said order of January 27, 1930, was granted, including the petition of Leo J. Linder, duly ver-fied the 27th day of January, 1930, and the affidavit of Nathaniel M. Satloff, duly verified the 27th day of January, 1930; and from the petition of D. Ginsberg & Sons, Inc., verified the 4th day of December, 1930, that Joseph Popkin, president of the bankrupt corporation has failed and refused to submit

himself to examination pursuant to orders and decrees of the United States District Court for the Eastern District of New York, and has evaded service of an order to show cause directing him to show cause why he should not be punished for contempt, and is about to leave the jurisdiction and district of this court to avoid examination and to avoid accounting for substantial sums of money appropriated by the said Joseph Popkin, and for the further purpose of going into other parts beyond the jurisdiction of this court, tending to the great prejudice and damage of the creditors of the bankrupt, and to the prejudice of and intending to impair, impede and defeat the orders and decrees of this court

Now, therefore, in order to prevent this injustice, we command you that you do without delay apprehend and take into custody Joseph Popkin, an officer of the bank-
[fol. 17] rupt corporation above named, and bring him forthwith before me for examination, or, at his option, cause him to give sufficient bail or security in the sum of $10,000 to be approved by this court, or the Clerk thereof, that he the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial jurisdiction of this court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the court herein for his examination, in default of which he is to be lodged in New York County Jail, which shall or may be made on behalf of the said petitioner or other creditors of the said bankrupt.

Dated December 4, 1930.

Henry W. Goddard, U. S. D. J.

Prisoner Popkin released from custody upon executing and filing a bond in the sum of $10,000.

12-6-30.

Charles Weiser, Clerk United States District Court.

[fol. 18] IN UNITED STATES DISTRICT COURT, EASTERN NEW YORK

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt

ORDER MADE THE 4TH DAY OF DECEMBER, 1930, ALLOWING APPLICATION IN THE SOUTHERN DISTRICT FOR ANCILLARY PROCESS AND ORDER OF NE EXEAT

D. Ginsberg & Sons, Inc., a creditor herein, having made application for leave to institute ancillary proceedings in the United States District Court for the Southern District of New York and for the District of New Jersey, for the purpose of obtaining an ancillary order of examination of Joseph Popkin, President of the bankrupt corporation [fol. 19] herein, and of certain witnesses, being or residing in the said Districts, and for the purpose of obtaining ne exeat orders directed to the Marshals of the said two Districts, and it appearing that the said application is necessary, and proper,

Now, upon reading and filing the petition of D. Ginsberg & Sons, Inc., a creditor herein, duly verified, and upon motion of Leo J. Linder, Attorney for the petitioner it is

Ordered that the application herein be and it hereby is granted, and D. Ginsberg & Sons, Inc., be and it hereby is authorized and empowered to apply to the United States District Court for the Southern District of New York and for the District of New Jersey, *and* for an ancillary order of examination of such witnesses within the jurisdiction of said courts as may be necessary as to the acts, conduct or property of the bankrupt corporation herein, and for orders ne exeat directed to the Marshals for the Southern District of New York and for the District of New Jersey.

Robert A. Inch, U. S. D. J.

[fol. 20] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

PETITION OF D. GINSBERG & SONS, INC., SUBMITTED IN SUPPORT OF APPLICATION MADE IN THE EASTERN DISTRICT OF NEW YORK FOR THE ISSUANCE OF ANCILLARY PROCESS IN THE SOUTHERN DISTRICT

To the United States District Court for the Eastern District of New York:

The petition of D. Ginsberg & Sons, Inc., shows:

1. That your petitioner is a creditor of the above named bankrupt.

2. Having duly filed its proof of claim herein in the sum of $14,958.15, a petition in involuntary *petition in* bankruptcy was heretofore filed against the said bankrupt, who was thereafter adjudicated such.

3. That upon the petition of your petitioner, verified the 2nd day of December, 1930, Honorable Robert A. Inch, Dis-
[fol. 21] trict Judge, granted an order dated December 3, 1930, directing the United States Marshal for the Eastern District of New York, to take into his custody Joseph Popkin, president of the above named bankrupt corporation, or cause him to give sufficient bail in the sum of $10,000.00, that he will not depart from the jurisdiction of this Court.

4. That officers of your petitioner, in company with a Deputy Marshal of the United States Marshal's office for the Eastern District of New York, and a clerk employed in the office of Leo J. Linder, attorney for your petitioner herein, found Joseph Popkin in the Borough of Manhattan, but the said Deputy Marshal was not able to effect service on him there because he was outside of his territorial jurisdiction. Your petitioner caused Joseph Popkin to be followed and traced him to Jersey City, where he was late last night. Your petitioner believes that Joseph Popkin will stay out of the jurisdiction of this Court and will make it impossible for the United States Marshal for the Eastern District of New York or his deputies, to effect service of the order of arrest upon him within the territorial juris-

diction of this Court, and that it is absolutely necessary for the protection of the interests of the creditors that leave be granted to your petitioner to apply for ancillary orders of examination and orders of arrest to the United States [fol. 22] District Court for the Southern District of New York, and the United States District Court for the District of New Jersey.

5. This application is made by your petitioner, and not by the receiver or trustee herein, because one Benjamin Kronenberg, an attorney, is the trustee herein. Your petitioner believes that Benjamin Kronenberg represents interests which are not unfriendly to Joseph Popkin, and has, indeed, at one time represented the bankrupt corporation. Your petitioner is convinced that Benjamin Kronenberg will do nothing to apprehend Joseph Popkin and that it would endanger the interests of creditors that Benjamin Kronenberg should even be advised of the present application.

6. That in the administration of this estate it is absolutely imperative that Joseph Popkin, who, as your petitioner is informed, has failed to acount for over $100,000.00 of the funds of the bankrupt corporation, withdrawn by him personally, be apprehended and taken into custody and that he be forthwith examined.

Wherefore your petitioner prays for an order granting it permission to apply to the United States District Courts for the Southern District of New York and the District of [fol. 23] New Jersey, for ancillary orders of examination of Joseph Popkin and witnesses whose testimony is desired as to the acts, conduct and property of the bankrupt.

Dated December 4, 1930.

D. Ginsberg & Sons, Inc., by Dora Ginsberg, Petitioner.

Duly sworn to by Dora Ginsberg. Jurat omitted in printing.

[fol. 24] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

WRIT NE EXEAT, MADE THE 3RD DAY OF DECEMBER, 1930

To the United States Marshal for the Eastern District of New York or any of his deputies:

Whereas, it appears to the satisfaction of the District Court of the United States for the Eastern District of New York, sitting in bankruptcy, on the petition of D. Ginsberg & Sons, Inc., duly verified, and on the order previously made herein by Honorable Mortimer W. Byers, District Judge, dated January 27, 1930, and the papers upon which the said order of January 27, 1930, was granted, including the petition of Leo J. Linder, duly verified the 27th day of January, 1930, and the affidavit of Nathaniel M. Satloff, duly verified the 27th day of January, 1930, wherefrom it appears that Joseph Popkin, the president of the bankrupt corporation, has failed and refused to submit himself to examination pursuant to the orders and decrees of this Court, and has evaded service of an order to show cause directing him to show cause why he should not be punished for contempt, and is about to leave the district [fol. 25] and the jurisdiction of this Court to avoid examination, and to avoid accounting for substantial sums of money appropriated by Joseph Popkin, and for the further purpose of going into other parts beyond the jurisdiction of this Court, tending to the great prejudice and damage of the creditors of the bankrupt, and to the prejudice of and intending to impair, impede and defeat the orders and decrees of this Court.

Now, therefore, in order to prevent this injustice, we command you that you do without delay apprehend and take into custody Joseph Popkin, an officer of the bankrupt corporation above named, and bring him forthwith before me for examination, or, at his option, cause him to give sufficient bail or security in the sum of $10,000, Ten Thousand Dollars, to be approved by this Court, or the Clerk thereof, that he, the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial juris-

diction of this Court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the Court herein for his examination, which shall or may be made on behalf of the said petitioner or other creditors of the said bankrupt.

Dated December 3, 1930.

R. A. Inch, U. S. D. J.

[fol. 26] In United States District Court, Eastern District of New York

[Title omitted]

Petition of D. Ginsberg & Sons, Inc., Submitted in Support of Application for a Writ ne Exeat Made by the District Court of the Eastern District of New York on the 3rd Day of December, 1930

The petition of D. Ginsberg & Sons, Inc., respectfully shows and alleges:

1. That your petitioner is a creditor of the above named bankrupt, having duly filed its proof of claim herein in the sum of $14,958.15.

2. That a petition in involuntary bankruptcy having heretofore been filed against the above named bankrupt, and no answer having been filed the above named bankrupt was adjudicated such.

3. That your petitioner's attorney, Leo J. Linder, Esq., is also attorney for various other creditors of the above named bankrupt, and that in behalf of Halsey Marble & Tile Works, Inc., one of the said creditors, and your peti-
[fol. 27] tioner, Mr. Linder applied for and procured an order, made by Honorable Mortimer W. Byers, District Judge, on January 7, 1930, appointing Honorable Isaac F. Russell, Special Commissioner, and directing Joseph Popkin, president of the bankrupt corporation, to appear before the Special Commissioner. As appears from the verified petition of Leo J. Linder, a copy of which it attached hereto, subpœnas were duly issued by the Clerk of this Court to the said Joseph Popkin, and on January 8, 1930, service of the

subpœna on said Joseph Popkin was effected. Joseph Popkin did not appear for examination on January 10, 1930, as directed. The examination was adjourned from January 10, 1930, to January 17, 1930, and Herman Rosenblatt, Esq., an attorney, of 291 Broadway, New York City, who had filed a notice of appearance herein as attorney for the bankrupt corporation, was notified of the non-appearance of Joseph Popkin and of the adjourned date. Your petitioner is advised by its attorney, Mr. Linder, that Mr. Linder spoke with Mr. Rosenblatt, who advised Mr. Linder that he had communicated with Mr. Joseph Popkin, and that Joseph Pipkin denied having been served with a subpœna. Mr. Rosenblatt's letter contained the following statement:

[fol. 28] "Notwithstanding the failure to serve said subpœna, as alleged in your letter I have arranged with Joseph Popkin that I will produce him on the 24th day of January, 1930, at the Post Office Building for your examination."

The examination of Joseph Popkin was adjourned from January 17, 1930 to January 21, 1930, and Mr. Rosenblatt was advised of the adjournment. On January 21, 1930, when Joseph Popkin failed to appear, Special Commissioner Russell executed a certificate certifying Joseph Popkin for contempt of Court, a copy of which certificate is attached hereto, and on January 22, 1930, an order to show cause was made by District Judge Byers directing Joseph Popkin to show cause why he should not be punished for contempt. On January 24, 1930, Joseph Popkin again failed to appear, but Mr. Lesser, an attorney associated with Mr. Rosenblatt, the attorney for the bankrupt, appeared and stated that he believed that Joseph Popkin was out of town. Mr. Morris Ginsberg, vice-president of your petitioner, who verifies this petition, was, during all this time, in constant touch with Mr. Linder and endeavored to assist him in every way possible in effecting service on [fol. 29] Joseph Popkin, and in apprehending him. Your petitioner states that its officers made diligent efforts in co-operation with Mr. Linder and process servers employed by him, to serve Mr. Joseph Popkin with a copy of the order to show cause in the contempt proceedings, but without success.

On January 27, 1930, on the application of Mr. Linder, as attorney for creditors, an order was made by District Judge Byers commanding the United States Marshal for the Eastern District of New York to apprehend and take into custody Joseph Popkin, and to bring him forthwith before the said District Judge for examination. The said order was, as your petitioner is informed by Mr. Linder, immediately delivered to the United States Marshal, who thereafter, accompanied by a process server employed by Mr. Linder, endeavored to find Joseph Popkin. From that day, January 27, 1930, to this, the United States Marshal has never succeeded in finding Joseph Popkin, and the ne exeat order has lain dormant in the files of the United States Marshal.

In the meantime, Mr. Linder, in the interests of Halsey Marble & Tile Works, Inc., your petitioner, and other creditors, who had retained him, proceeded with the examina- [fol. 30] tion of witnesses before Special Commissioner Russell, conducting hearings throughout January, February and March, 1930. Benjamin Kronenberg, Esq., an attorney of 302 Broadway, New York City, who had at one time represented the bankrupt corporation, who had been appointed receiver in these proceedings, and who was subsequently appointed trustee in bankruptcy, was called as a witness, and on January 28, 1930, he testified as follows:

"Q. When did you last see Mr. Joseph Popkin?
A. I spoke to him the other day over the telephone. * * *
Q. When did you see him personally?
A. The early part of last week."

His son, Murray J. Popkin, who had also been subpœnaed, and who had likewise failed to appear for examination, did make his appearance on February 4, 1930. He testified that he "knew in the beginning of January, 1930, that bankruptcy proceedings were pending against Foster Construction Corporation," and that Mr. Kronenberg had told him, in January, 1930, that Mr. Linder desired to ex- [fol. 31] amine him. Murray J. Popkin, examined with respect to his father's whereabouts, testified as follows:

"Q. Where is your father?
A. I don't know.
Q. When did you last see him?

A. About two or two and a half weeks ago.
Q. Where?
A. Home.
Q. Have you heard from him?
A. No, sir.
Q. Have you made any attempt to locate him?
A. I have not made any attempt to locate him.
Q. Is he lost?
A. I would not say that he is lost.
Q. Have you reported his disappearance to the Police Department?
A. No, sir.
Q. Where is your mother?
A. With him (pp. 143-145, Testimony before Special Commissioner Russell).

The Murray J. Popkin who so testified was secretary of the bankrupt corporation. He testified that he had "been working for (his father) practically all his life" (p. 174, Testimony before Special Commissioner Russell), and that he was "with him all the time practically" (p. 175, Testimony before Special Commissioner Russell).

[fol. 32] Jean Popkin, a daughter of Joseph Popkin, was examined on February 7, 1930. She testified that she lived with her father. Her testimony was as follows:

Q. When did you last see him?
A. Three weeks ago today.
Q. That is on January 17?
A. Yes, sir.
Q. Will you look at the calendar and make sure of the date?
A. Yes, sir; three weeks ago today.
Q. Where was it that you last saw him?
A. At the house, when he left.
Q. Was your mother there at the same time?
A. Yes, sir.
Q. Did he tell you that he was going away?
A. Yes, sir.
Q. Did he tell you where he was going?
A. No, sir.
Q. Did you ask him?

A. No, sir (p. 199, Testimony before Special Commissioner Russell).

Q. Did he pack his bags?

A. Yes, sir (p. 201, idem.).

Q. Have you heard from your father or mother since January 17?

A. I have not (p. 202. idem.).

[fol. 33] Murray J. Popkin examined on February 7, 1930, also testified that he had not heard from his father. On February 11, 1930, Florence Popkin, another daughter of Joseph Popkin, was examined and she also testified that she last saw her father on or about January 17, 1930, and that she had no idea where he was. On March 4, 1930, Murray J. Popkin was again examined and again swore that he had not seen his father since he left in January. He did, however, state that he had received a letter from his father around the 17th or 18th of February. The letter was written from the Commodore Hotel, in Washington, D. C. He stated that he sent him a special delivery letter to the Commodore Hotel, but that he had not heard from him since.

Examinations were continued at frequent intervals until the latter part of March, 1930, and at these examinations Murray J. Popkin repeated the statement that he had not heard from his father, but believed him to be out of town.

Throughout this time and ever since January 27, 1930, your petitioner, together with various other creditors of Foster Construction Corporation, have independently endeavored to trace Joseph Popkin. Your petitioner, to-[fol. 34] gether with these other creditors, employed William J. Burns detective agency, and the operatives employed by this agency, endeavored to track down clues and rumors that Mr. Joseph Popkin was at one time in Toronto, Canada, at another time in a city in the south, at other times at various places in New York and New Jersey, but without any success whatsoever. Joseph Popkin had apparently checked in at the Commodore Hotel on the day when the letter to his son was mailed, but he had been careful to immediately check out the following day leaving no forwarding address.

Since the examinations before Special Commissioner Russell were suspended the following has occurred so far

as the bankruptcy proceedings themselves are concerned. In June, 1930, a first meeting of creditors was held before Hon. Alfred J. Hoffman, Referee in Bankruptcy, and at that meeting Benjamin Kronenberg, Esq., who admitted on examination before Special Commissioner Russell that he had, in 1929, represented the bankrupt corporation, was elected trustee in bankruptcy. Mr. Kronenberg was elected over the objection of your petitioner and four other creditors of the bankrupt corporation, whose filed claims aggregated more than $51,000.00. This objection, which was [fol. 35] taken by your petitioner's attorney, Mr. Linder, was expressed, not only by a vote against his appointment, but by the objection specifically expressed as to the propriety of his serving as trustee in bankruptcy by reason of his relations with the bankrupt corporation and by reason of the fact, further, that your petitioner and the four other creditors represented by Mr. Linder believed that there was a cause of action against Mr. Kronenberg for breach of trust based upon Mr. Kronenberg's conduct while a trustee of the real property of the bankrupt corporation under a deed of trust executed in April, 1929, before the bankruptcy proceedings. A deficiency judgment of $397,850.00 having been procured by Three Ems Bee Jay Realty Corporation, this corporation, which had formerly been represented by the same Mr. Kronenberg, its attorney, filed its proof of claim for that amount, and by virtue of this claim was enabled to effectively vote for the appointment of Mr. Kronenberg as trustee. Mr. Kronenberg, since his appointment as trustee, has not conducted any examination whatsoever and the entire bankruptcy proceedings have apparently lapsed.

In this condition of affairs, Joseph Popkin has apparently regarded it as safe for him to return to the [fol. 36] County of Queens. Your petitioner has just discovered that Joseph Popkin is in town and believes that he can be apprehended without any trouble in the course of the next few days, provided he has no notion that anybody desires to effect service upon him. Your petitioner is convinced by everything that has happened in this case that, if Joseph Popkin learns that he is wanted for examination he will disappear again immediat-ly.

The disappearance of Joseph Popkin in January, 1930, is his second disappearance in the face of a threatened

prosecution of him by his creditors. Mr. Kronenberg testified that, in 1929, Joseph Popkin arranged with him to call a meeting of the creditors of the bankrupt corporation at the office of Mr. Kronenberg, and that immediately after he made this arrangement he left this country and went to Canada. Mr. Morris Ginsberg an officer of your petitioner, who verifies this petition, was present at the meeting of creditors which Kronenberg called in April, 1929. The creditors present were not informed that Joseph Popkin had left the country, but were placated into not taking any action against Joseph Popkin or the bankrupt corporation upon a consideration of the equities and the financial con-
[fol. 37] dition of the bankrupt corporation at that time. Just when Joseph Popkin returned to this country after April, 1929, your petitioner does not know, but, in any event, your petitioner believes that he did not return until he was certain that the creditors were placated and would not proceed with any investigation. Joseph Popkin remained in this country then until January, 1930, when your petitioner and the other creditors who had retained Mr. Linder, had made it clear that they proposed to have a thorough and complete investigation of the affairs of the bankrupt corporation. On this second disappearance he did not return until so many months had elapsed that he was again satisfied that the creditors had, in all probability, forgotten about the matter and would not disturb him. There cannot be the slightest question that Joseph Popkin does not dare to submit to examination and will go to almost any length to avoid examination. Your petitioner requests that the ne exeat order herein prayed for is the only measure that will effectively guard and protect the interests of the creditors.

4. Your petitioner is informed by the accountant whom Mr. Linder employed that Joseph Popkin, president of the
[fol. 38] bankrupt corporation, has drawn checks to his personal order in sums aggregating more than $100,000.00; that the greater part of these withdrawals are not accounted for or even entered in any way in the books of account of the bankrupt corporation. It is of vital importance for the protection of the interests of all the creditors that Joseph Popkin be not permitted to leave the jurisdiction at this time without first having appeared for examination and accounted for these moneys.

5. That no previous application has been made for the order prayed for herein except that an application was made for the order of District Judge Byers, dated, January 27, 1930, and such order was granted under the circumstances hereinbefore stated.

Wherefore your petitioner prays for an order requiring the Marshal of this district forthwith to apprehend and take into his custody Joseph Popkin, president of the bankrupt corporation herein, to the end that he may not depart from the jurisdiction of this court, and for such other and further relief as may be just and proper.

Dated December 2, 1930.

D. Ginsberg & Sons. Inc., by Morris Ginsberg, Vice-President.

[fol. 39] *Duly sworn to by Morris Ginsberg. Jurat omitted in printing.*

[fol. 40] In United States District Court, Eastern District of New York

[Title omitted]

Order of Arrest Made the 27th Day of January, 1930

To the United States Marshal for the Eastern District of New York or any of his deputies:

Whereas, it appears to the satisfaction of the District Court of the United States for the Eastern District of New York, sitting in bankruptcy, on the petition of Leo J. Linder, duly verified, and the affidavit of Nathaniel N. Satloff, duly verified the 27th day of January, 1930, wherefrom it appears that Joseph Popkin and Murray J. Popkin, the president and secretary, respectively, of the bankrupt corporation, have failed and refused to submit themselves to examination pursuant to the orders and decrees of this Court, and have evaded service of an order to show cause directing them to show cause why they should [fol. 41] not be punished for contempt, and are about to leave the district and the jurisdiction of this court to avoid examination, and to avoid accounting for sub-

stantial sums of money appropriated by Joseph Popkin and Murray J. Popkin, and for the further purpose of going into other parts beyond the jurisdiction of this Court, tending to the great prejudice and damage of the creditors of the bankrupt, and to the prejudice of and intending to impair, impede and defeat the orders and decrees of this court,

Now, therefore, in order to prevent this injustice, we command you that you do without delay apprehend and take into custody Joseph Popkin and Murray J. Popkin, officers of the said bankrupt corporation, and bring them forthwith before me for examination.

Jan. 27, 1930.

Mortimer W. Byers, U. S. D. J.

[fol. 42] In United States District Court, Eastern District of New York

[Title omitted]

Petition of Leo J. Linder in Support of Application for an Order of Arrest Made the 27th Day of January, 1930, by the District Court for the Eastern District of New York

The petition of Leo J. Linder, respectfully shows and alleges:

1. That he is attorney for Halsey Marble & Tile Works, Inc., a creditor of the above named bankrupt.

2. That a petition in involuntary bankruptcy was heretofore filed against the above named bankrupt, and, no answer having been filed, the above named bankrupt was adjudicated such.

3. That on the application of the creditor represented by your petitioner, and on your petitioner's motion, an order was duly made by Mr. Justice Byers, District Judge, on January 7, 1930, appointing Honorable Isaac Franklin Russel, Special Commissioner and directing Joseph Popkin, [fol. 43] president of the bankrupt corporation, Murray J. Popkin, his son, secretary of the bankrupt corporation, and Benjamin Kronenberg, Esq., an attorney of 302 Broad-

way, New York City, to appear before the Special Commissioner.

4. That your petitioner thereupon immediately procured subpœnas to be duly issued by the Clerk of this court to the aforementioned parties, and on January 8, 1930, service of subpœnas on Joseph Popkin and Murray J. Popkin was effected. Neither Joseph Popkin, nor his son, Murray J. Popkin, appeared for examination on January 10, 1930, at the time and place designated in the subpœnas and their default was duly noted. On January 10, 1930, Benjamin Kronenberg, Esq., an attorney who at one time represented the bankrupt corporation and the witnesses who failed to appear for examination, appeared for examination and in the course of his examination testified that in April, 1929, Joseph Popkin, the president, had come to him and told him that he wanted Mr. Kronenberg to call a meeting of his creditors because he could not continue any further and that immediately after this Joseph Popkin left the country. Mr. Kronenberg testified that he finally located Mr. Joseph Popkin in Toronto, Canada, where he had followed him, and that in Canada Joseph Popkin gave back to Mr. Kronen- [fol. 44] berg $27,500.00 in cash, which Mr. Kronenberg, then turned over to a client of his in reduction of a mortgage obligation of the bankrupt corporation. While Mr. Kronenberg testified that this sum "belonged to his client", his testimony indicates that the sum of money involved was funds of the bankrupt corporation. On the following day your petitioner telephoned to Herman Rosenblatt, Esq., an attorney at 291 Broadway, New York, who has filed a notice of appearance herein as attorney for the bankrupt, and told Mr. Rosenblatt that Special Commissioner Russell had adjourned the examination held before him on January 10 to January 17, 1930, at two o'clock, and if Mr. Rosenblatt would produce Mr. Popkin at that time your petitioner would not institute contempt proceedings. Mr. Rosenblatt told your petitioner over the telephone that he would communicate with Mr. Popkin and advise your petitioner by letter. On January 11, 1930, your petitioner wrote to Mr. Rosenblatt advising him of the default of Joseph Popkin and Murray J. Popkin in appearance on January 10, 1930, and requesting that Mr. Rosenblatt advise your petitioner immediately as to whether his clients, the officers of the bankrupt corporation, would appear for examination

on January 17, 1930. On January 13, 1930, your petitioner spoke to Mr. Rosenblatt again and was informed by him [fol. 45] that he had communicated with Joseph Popkin and that Joseph Popkin denied that he had been served with any subpœna but that he was entirely willing to submit to examination. Mr. Rosenblatt advised your petitioner that he would write him confirming this. On January 16, 1930, your petitioner received a letter from Mr. Rosenblatt in which Mr. Rosenblatt stated that Joseph Popkin and Murray J. Popkin both denied having been served with a subpœna. Mr. Rosenblatt's letter, however, contained the following statement: "Notwithstanding the failure to serve said subpœnas, as alleged in your letter, I have arranged with Joseph Popkin that I will produce him on the 24th day of January, 1930, at the Post Office Building for examination." Upon receipt of this letter your petitioner wrote Mr. Rosenblatt again advising him that the examination set for January 17, 1930, would be adjourned to Tuesday, January 21, 1930, and requesting that Mr. Rosenblatt produce Joseph Popkin on January 21st. Mr. Rosenblatt telephoned your petitioner and told him that he would try to arrange with Mr. Popkin for his appearance on Tuesday, January 21, 1930, but that in any event Mr. Popkin would appear on January 24, 1930, at two o'clock. On January 21, 1930, when neither Mr. Rosenblatt, Joseph Popkin nor his son, Murray J. Popkin, appeared, your petitioner submitted a certificate certifying Joseph Popkin and Murray [fol. 46] J. Popkin in contempt to Special Commissioner Russel, and the certificate was executed and a copy thereof is attached hereto. Immediately your petitioner prepared an order to show cause why Joseph Popkin and Murray J. Popkin should not be punished for contempt of court and on January 22, 1930, on the petition of Halsey Marble & tile Works, Inc., the creditor represented by your petitioner, an order to show cause was made by Mr. Justice Byers directing Joseph and Murray J. Popkin to show cause why they should not be punished for contempt. The order to show cause was issued to Joseph Popkin and Murray J. Popkin for service, and, as is stated in the affidavit of Nathaniel M. Satloff, annexed hereto, service thereof could not be effected. On January 24, 1930, your petitioner saw Mr. Rosenblatt and was assured by Mr. Rosenblatt that Joseph Popkin would be present for examination on that

afternoon at two o'clock, Joseph Popkin did not appear at the time set for the examination. Almost three quarters of an hour after two o'clock, Reuben Lesser, Esq., an attorney associated with Herman Rosenblatt, Esq., attorney for the bankrupt, appeared and stated that he had been sent there by Mr. Rosenblatt, but that he did not know anything about Mr. Popkin's whereabouts. Mr. Lesser stated that he believed that Joseph Popkin was out of town. [fol. 47] Your petitioner retained Hyman Levine, an accountant, to examine into such books and records of the bankrupt corporation as were in the custody of Benjamin Kronenberg, Esq., and in the course of his investigation the accountant has met Murray J. Popkin and examined certain of the records of the bankrupt corporation. Murray J. Popkin, who is not, as Mr. Rosenblatt averred in his letter, out of town, declined to give the accountant any information as to the whereabouts of his father, but on Thursday, January 23, 1930, when the accountant went to Woodside National Bank, Woodside, New York, with a subpœna issued by the Clerk of this court, he was informed that Joseph Popkin had been there earlier that morning, had spoken to one of the officers and left word that under no circumstances should any records or data concerning his accounts be shown to your petitioner or your petitioner's accountant. From the foregoing your petitioner respectfully states that Joseph Popkin is evading the service of the process of this court upon him and is secreting himself. Diligent efforts to discover his whereabouts have been made by your petitioner, the accountant, the process server whose affidavit is annexed hereto, and persons in the employ of the process server. The investigations made thus far do not reveal the place where Joseph Popkin is hiding. His attorney, Mr. Rosenblatt, knows where that [fol. 48] place is, or, in any event, knows how to reach Mr. Popkin, because Mr. Rosenblatt told your deponent that he had spoken to Mr. Popkin and wrote your petitioner that he had "arranged with" Joseph Popkin that he should appear on January 24, 1930. Immediately after Joseph Popkin arranged with his then attorney, Benjamin Kronenberg, Esq., to call a meeting of creditors he left this country and went to Canada. Mr. Kronenberg called this meeting of creditors and the creditors were placated into not taking any action against Joseph Popkin at that time. Just when

Joseph Popkin returned to this country your petitioner does not know, but in any event your petitioner believes that he did not return until it was certain that the creditors had been placated and would not proceed with any investigation just then. Your petitioner believes from the statements made to Nathaniel M. Satloff, as stated in his affidavit, annexed hereto, that he has told various persons that he was going away and that there cannot be any question but that Joseph Popkin is preparing to leave the jurisdiction. On Thursday last he was still within the jurisdiction. Your petitioner believes that he is still here. Mr. Rosenblatt, Joseph Popkin's attorney, has stated volubly over the telephone and in his letter that Joseph Popkin was not served with a subpœna. Whether he was served or not [fol. 49] (evidence sufficient to warrant the Special Commissioner in executing a certificate certifying them for contempt was presented to the Special Commissioner) there cannot be the slightest question but that Joseph Popkin knows that he is wanted for examination and that he does not wish just now to answer any questions. If Joseph Popkins is allowed to leave the jurisdiction it will seriously impair, impede and defeat the orders and decrees of this court, enable him to avoid examination and result in great loss to this estate, militate very seriously against the recovery of assets concealed and fraudulently disposed of by the bankrupt.

5. Your petitioner is informed by the accountant he has employed that Joseph Popkin and Murray J. Popkin, president and secretary, respectively, of the bankrupt corporation, have drawn checks to their personal order in sums aggregating more than $100,000.00; that the greater part of these withdrawals are not accounted for or even entered in any way in the books of the account of the bankrupt corporation. It is of vital importance for the protection of the interests of all the creditors that Joseph Popkin and Murray J. Popkin be not permitted to leave the jurisdiction at this time without first having appeared for examination and accounted for these moneys.

[fol. 50] 6. That no previous application has been made for the order prayed for herein.

Wherein petitioner prays for an order requiring the marshal of this district forthwith to apprehend and take into his custody Joseph Popkin and Murray J. Popkin, the

president and secretary, respectively, of the bankrupt herein, to the end that he may not depart from the jurisdiction of this court and for such other and further relief as may be just and proper.

Dated January 27, 1930.

Leo J. Linder, Petitioner.

[fol. 51] *Duly sworn to by Leo J. Linder. Jurat omitted in printing.*

[fol. 52] UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF NATHANIEL M. SATLOFF, SUBMITTED IN SUPPORT OF APPLICATION FOR AN ORDER OF ARREST MADE THE 27TH DAY OF JANUARY, 1930, BY THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
County of New York, ss:

Nathaniel M. Satloff, being duly sworn, deposes and says that he resides at 736 Willoughby Avenue, Brooklyn, New York. My business is that of serving processes for lawyers, and that on January 7, 1930, I received from Leo J. Linder, Esq., 67 Wall Street, New York City, two subpœnas duly issued by the United States District Court for the Eastern District of New York, to Joseph Popkin and Murray J. Popkin. These subpœnas were delivered by me to Isaac Greenberg, a process server in my employ, and on January 8, 1930, Issac Greenberg effected service of both subpœnas upon Joseph Popkin and Murray J. Popkin, respectively. [fol. 53] I have been informed by Mr. Linder that neither Joseph Popkin nor Murray J. Popkin appeared for examination on January 10, 1930, pursuant to the subpœnas.

On January 22, 1930, I received from Mr. Linder an order to show cause made by Mr. Justice Byers, a justice of this court, with instructions to serve copies of the said order to show cause on Joseph Popkin and Murray J. Ponkin.

On January 22, 1930, at about four thirty o'clock in the afternoon, I left Mr. Linder's office with the original and

copies of the order to show cause, and went to 43-06—159th Street, Flushing, Long Island, the address of Joseph Popkin and Murray J. Popkin. The premises here are an apartment house in which an apartment is occupied by "Popkin". I saw the superintendent of the building and asked her if Joseph Popkin lived there. She told me that he did and that his son, Murray J. Popkin, also lived there. She described both men to me. She also described to me the only woman in the apartment, and told me that this woman was the daughter of Joseph Popkin. I went up to the apartment and rang the bell and the woman, whom the superintendent described to me as Joseph Popkin's daughter, told me that he was not in and that neither Jo-
[fol. 54] seph Popkin nor Murray J. Popkin were home and that she did not know when they would be in. The woman would give me no further information.

This was at about six o'clock in the evening. I then went back to see the superintendent and she gave me another description of Joseph Popkin and Murray J. Popkin. I asked the superintendent when she had last seen Joseph Popkin and Murray J. Popkin and she told me that she had not seen them for about two weeks. I, nevertheless, waited in front of the "Popkin" apartment from six o'clock until ten thirty o'clock, but neither Joseph Popkin nor Murray J. Popkin came to the apartment.

The next morning, January 23, 1930, I went back to the same apartment house arriving there at about seven o'clock in the morning, and waited in front of the apartment house for Joseph Popkin or Murray J. Popkin to leave the apartment house, until eleven o'clock, but I did not see either of them leave. I left the apartment house for a few minutes to telephone Mr. Linder advising him that I would need some additional time to serve Joseph Popkin and Murray J. Popkin because the order to show cause allowed service only to four o'clock. I came back to Mr. Linder's office at about four thirty in the afternoon and found that the original order to show cause had been changed so as
[fol. 55] to permit service to eight o'clock. I went back to Flushing and waited for Joseph Popkin or Murray J. Popkin in front of the same apartment house until eight o'clock after having first rung the bell of the "Popkin" apartment and spoken to the same woman who was described to me as Joseph Popkin's daughter and having been informed by her that she could give me no information about

Joseph Popkin or Murray J. Popkin. After eight o'clock I endeavored to get some further information as to the whereabouts of Joseph Popkin and Murray J. Popkin and went to the apartment house known as "Stryker Hall", at one time controlled by the Popkins, at 37-76—62nd Street, Woodside, and there spoke to the superintendent of the building and was told by him that Joseph Popkin and Murray J. Popkin, his son, had been there a day or two before and that they had told him then that they were going away and would not be back for a little while.

Nathaniel M. Satloff.

Sworn to before me this 27th day of January, 1930. Oliver D. Willams, Commissioner of Deeds. New York Co. Clk. No. 147, Reg. No. 53-W-1. Kings Co. Clk. No. 32, Reg. No. 1030. Commission expires May 14, 1931.

[fol. 56] In United States District Court, Southern District of New York

M. 13, 320

In the Matter of Foster Construction Corp., Bankrupt

On motion to set aside an order for an ancillary examination and granting ex parte for a writ in the nature of a writ ne exeat, under which the President of the bankrupt, long a fugitive, was arrested in this district.

Louis Jersawit, Esq., Attorney for Joseph Popkin, the president of the bankrupt, in support of the motion to set aside writ.

Leo J. Linder, Esq., Attorney for D. Ginsberg & Sons, creditors on whose petition the writ was granted—in opposition thereto.

Opinion, Woolsey, D. J.

Woolsey, J.:

This motion is in all respects denied.

I. On December 3, 1930, Judge Inch in the Eastern District of New York, in which the above named proceedings in bankruptcy is pending, granted an order on application

of D. Ginsberg & Sons, a creditor in the said bankruptcy [fol. 57] proceedings, by which it was authorized and empowered to apply to this court:

1. For an ancillary order of an examination of Joseph Popkin and such other witnesses within this jurisdiction, as may be necessary, as to the acts, conduct and property of the bankrupt corporation, and

2. For orders ne exeat directed to the Marshal of the Southern District of New York.

This permission and authority was by the order extended also to the District of New Jersey, but that concerns us not. This order was filed in this district on December 4, 1930, as a foundation for the proceeding now before me. Cf. Babbitt vs. Dutcher, 216 U. S. 102, 114; ex parte Elkus, 216 U. S. 115, 116, 117.

II. In pursuance of this authority and permission and on the 4th day of December, 1930, Judge Goddard, on petition of D. Ginsberg & Sons granted, ex parte an order for ancillary examination of Joseph Popkin before Referee Erhhorn and an order ne exeat against him.

The petition on which this order was granted reads, as far as it is relevant, as follows:

"1. That your petitioner is a creditor of the above named bankrupt, having duly filed its proof of claim herein in the sum of $14,958.15.

2. That on the 23rd day of September, 1929, a petition in bankruptcy was filed against the above named bankrupt in the United States District Court for the Eastern Dis- [fol. 58] trict of New York, and thereafter Foster Construction Corporation was duly adjudicated a bankrupt in said court.

3. That Joseph Popkin is the president of the bankrupt corporation and he has withdrawn and failed to account for more than $100,000.00 of the cash funds of the bankrupt corporation. Joseph Popkin has never been examined in the bankruptcy proceedings hereinabove referred to. In 1929, Joseph Popkin fled to Canada to avoid arrest and remained out of the jurisdiction until such time as he believed his creditors had been placated into not taking any action against him. On January 27, 1930, a ne exeat order

was made by the United States District Court for the Eastern District of New York commanding the United States Marshal for the said district to take Joseph Popkin into custody, but Joseph Popkin again fled the jurisdiction of the United States District Court for the Eastern District of New York, and in spite of the strenuous efforts made by your petitioner and other creditors, no trace could be found of him. Your petitioner discovered a few days ago that Joseph Popkin had came back to Greater New York and applied for and procured an order yesterday, December 3, 1930, made by Honorable Robert A. Inch, District Judge, commanding the United States Marshal for the Eastern District, to arrest Joseph Popkin or cause him to give bail in the sum of $10,000.00 That officers of [fol. 59] your petitioner, with a Deputy United States Marshal of the Eastern District proceeded to Manhattan yesterday afternoon upon ascertaining that he was in an office building in Manhattan, and followed him from an office building in Manhattan to Jersey City, where Joseph Popkin apparently went to spend last night. Your petitioner believes that Joseph Popkin is aware that he is being hunted and that he has fled to Jersey City believing that he was safe there. Your petitioner does not know whether Joseph Popkin will return to New York City or will return to Jersey City, but believes it imperative that an order directing his examination and directing a United States Marshal for this district to take him into custody is necessary. Your petitioner believes that if Joseph Popkin is not apprehended immediately that he will again run away and leave the United States as he did before.

4. This application is made by your petitioner instead of by a trustee in bankruptcy, who was appointed herein in June, 1930, because the trustee in bankruptcy, who was appointed herein, is Benjamin Kronenberg, an attorney, who at one time represented the bankrupt corporation and who, your petitioner believes, is friendly with Joseph Popkin. The trustee in bankruptcy was elected over the objection of your petitioner and various other creditors, which objection was specifically grounded on the impropriety of his [fol. 60] serving as trustee by reason of his relations with the bankrupt corporation, but that, nevertheless, in spite of this objection, Benjamin Kronenberg was appointed trustee by virtue of the votes of certain creditors, including

creditors who had at one time been personally represented by the same Mr. Kronenberg. That your petitioner believes that it would endanger the interests of creditors to even notify Mr. Kronenberg of this application.

5. That Joseph Popkin's testimony is material and necessary in aid of the petitioner as to the acts, conduct and property of the bankrupt, and that Joseph Popkin was in a number of office buildings yesterday in the Borough of Manhattan, apparently transacting some business there, and your petitioner believes that he may be found in the Borough of Manhattan some time today. Your petitioner further states that Joseph Popkin slept last night in a residence in Jersey City, and that he may appear again in Jersey City some time during today or this afternoon. That Joseph Popkin will unquestionably leave the jurisdiction of this court and, in all probability, leave the jurisdiction of the United States for a third time if he is not apprehended immediately.

6. That ancillary proceedings to obtain this order of examination and ne exeat order are necessary in this District, and on the 4th day of December, 1930, the United States District Court for the Eastern District of New [fol. 61] York, by an order entered therein, duly authorized the petitioner to apply to this court for an ancillary order of examination and order of arrest."

III. The order so granted by Judge Goddard was duly served on Popkin, and on his arrest he posted a bond in the sum of $10,000, as fixed by Judge Goddard.

IV. The point made by the moving party that the papers are insufficient on their face is wholly without merit and will not be further mentioned.

It is urged, however, that as Popkin is not himself the bankrupt but merely the president of a bankrupt corporation, the order of ne exeat could not properly be granted for the reason that such a writ is limited to a party in suit and has not been extended to witnesses. The provenance and early history of the writ of ne exeat may be found in Beames on Ne Exeat, Chap. 1; and Spedding's Edition of Bacon's Works, Vol. VII, pp. 771, 772.

Cases are cited by the moving party as instances of the use of the writ, all of which involved the arrest of the bankrupt himself or of the party respondent in equity.

The question of the extension of the writ to a situation of the kind here shown is believed, therefore, to be of first impression.

It should be observed that the application was not made under Section 9, Sub. b of the Bankruptcy Act of 1898, which deals precisely with such a writ against the bankrupt, but under Sec. 2, Sub. 15 of the Bankruptcy Act which [fol. 62] endows Courts of bankruptcy as defined in the Act, with all the powers necessary to enforce the provisions of the act.

Bankruptcy Act of 1898, Sec. 2—inter alia, provides as follows (italics mine):

"That the courts of bankruptcy * * * are hereby invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (15) *make such orders, issue such processes* and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

A "process" is a "writ, warrant, subpœna or other formal writing issued by authority of law". Bouvier's Law Dictionary, Rawle's third Revision, Vol. 2, p. 2731. Judge Goddard's order clearly falls within this definition.

V. The incorporation of the bankrupt is invoked as creating a non-conductor between creditors and Popkin, the president of the bankrupt, and Klein vs. Board of Supervisors, 282 U. S. 19, 24, is cited.

This argument does not go far towards meeting the situation here.

The corporate entity is a non-conductor between stockholders and the outside world in most jurisdictions and in most cases. But this useful characteristic does not apply between an officer of a bankrupt corporation and the bankruptcy court, or its officers and mandatories.

Officers of a bankrupt corporation are regarded in courts [fol. 63] of bankruptcy as the bankrupts for many purposes which it is unnecessary to enumerate.

Cf. Remington on Bankruptcy, sec. 542, pp. 1977, 2384; and see also Remington on Bankruptcy, Sec. 3009; in Re Alpin vs. Lake Cotton Co., 131 Fed. 824, 825, 826; in re

Fixen & Co., 96 Fed. 748, 752; in re Horgan & Slattery, 98 Fed. 414, 415, 416 (C. C. A. 2); in Re Muncie Pulp Co., 139 Fed. 546, 548 (C. C. A. 2); in re Royce Dry Goods Co., 133 Fed. 100, 106; in re Cantelo Mfg. Co., 185 Fed. 276.

VI. The order issued by Judge Goddard, even if it be not regarded as a strictly canonical ne exeat order is in the nature of such an order and in the granting of it, I think Judge Goddard acted entirely within the powers granted to courts of bankruptcy by Sec. 2, Sub. 15 of the Bankruptcy Act to "make such orders and issue such processes * * * in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

Certainly the order here complained of is necessary under the circumstances here alleged—of which the truth is not challenged—in order to enforce the provisions of the Bankruptcy Act in connection with this bankrupt's estate.

If this court did not have the power here invoked and exercised dishonest officers of bankrupt corporations could flout the bankruptcy Law with impunity.

Settle order on two days notice.

February 17, 1931.

Woolsey, United States District Judge.

[fol. 64] In United States District Court, Southern New York

In the Matter of Foster Construction Corporation, Bankrupt

Order Appealed From—Feb. 20, 1931

An ancillary order of examination and ne exeat having been granted herein pursuant to an order dated December 4, 1930, of the Eastern District, authorizing ancillary proceedings in this District, by Hon. Henry W. Goddard, District Judge, on the 4th day of December, 1930, directing the examination and apprehension of Joseph Popkin, president of the bankrupt corporation, and a motion having been made brought on by order to show cause, dated December 8, 1930, made by Hon. John M. Woolsey, District Judge

herein, for an order quashing, vacating and setting aside the said order of December 4, 1930, and the said motion [fol. 65] having come on regularly to be heard at a stated term of this court on December 10, 1930,

Now, on reading and filing the said order to show cause, dated December 8, 1930, and the affidavit of Joseph Popkin, sworn to the 8th day of December, 1930, annexed thereto, and the ancillary order of examination and ne exeat granted December 4, 1930, by Hon. Henry W. Goddard, District Judge herein, and the petition of D. Ginsberg & Sons, Inc., a creditor of the bankrupt herein, verified the 4th day of December, 1930, and the other papers in which the said order of ne exeat was granted, to wit: the order made by Hon. Robert A. Inch, District Judge of the United States District Court for the Eastern District of New York, directing the arrest of Joseph Popkin, dated December 3, 1930, the petition of D. Ginsberg & Sons, Inc., verified December 2, 1930, the order made by Hon. Mortimer W. Byers, District Judge of the United States District Court for the Eastern District of New York, granted the 27th day of January, 1930, directing the apprehension of the said Joseph Popkin, and the petition of Leo J. Linder, verified the 27th day of January, 1930, the affidavit of Nathaniel M. Satloff, verified the 27th day of January, 1930, submitted by the attorney for the petitioning creditor in opposition to the said motion, and Louis Jersawit, Esq., attorney for Joseph Popkin, appearing in support of said motion, and Leo J. Linder, Esq., attorney for D. Ginsberg & Sons, Inc., a creditor, appearing in opposition [fol. 66] thereto, and on all the papers and proceedings had herein, and the said application of Joseph Popkin to vacate the said order in so far as it provides for the examination of Joseph Popkin having been denied by order made by Hon. John M. Woolsey, District Judge herein, on the 11th day of December, 1930, and due deliberation having been had,

Now, on motion of Leo J. Linder, attorney for D. Ginsberg & Sons, Inc., a creditor, it is hereby

Ordered that the motion of Joseph Popkin, the respondent, be and it hereby is in all respects denied.

Woolsey, U. S. D. J.

[fol. 67] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Joseph Popkin, an officer of the above named bankrupt, files the following Assignment of Errors on his appeal from the Order made by the United States District Court for the Southern District of New York, on the 20th day of February, 1931:

Said United States District Court for the Southern District of New York therein erred as follows, to wit:

1. In denying the motion of Joseph Popkin, an officer of the above named bankrupt, to quash, vacate and set aside the ancillary order of ne exeat made and issued by Judge Goddard on the 4th day of December, 1930, based upon the petition of D. Ginsberg & Sons, Inc., a creditor of the above named bankrupt, bearing date and verified the 4th day of December, 1930, as it affirmatively appears from the ancillary order of ne exeat of Judge Goddard, bearing date the 4th day of December, 1930, that he had no power, authority or jurisdiction to issue an ancillary order of ne exeat, the said Joseph Popkin not being the bankrupt herein, and that it affirmatively appears from the [fol. 68] petition of D. Ginsberg & Sons, Inc., bearing date the 4th day of December, 1930, that said Joseph Popkin was not the bankrupt herein.

2. That Judge Goddard as one of the Judges of the United States District Court for the Southern District of New York, had no power, authority or jurisdiction to issue an ancillary order of ne exeat except against a bankrupt, and that Joseph Popkin was not the bankrupt herein.

3. That it affirmatively appears from the ancillary order of ne exeat issued by Judge Goddard on the 4th day of December, 1930, and the petition of D. Ginsberg & Sons, Inc., verified the 4th day of December, 1930, upon which the said order was predicated, that Joseph Popkin was not the bankrupt in the bankruptcy proceedings herein, but that the bankrupt was the Foster Construction Corporation above named.

4. That it affirmatively appears from said ancillary order of Judge Goddard and the petition of D. Ginsberg &

Sons, Inc., that the primary jurisdiction of the bankruptcy proceeding was in the United States District Court for the Eastern District of New York, and that no ancillary order of ne exeat could issue out of the United States District Court for the Southern District of New York, for the apprehension of said Joseph Popkin, and that Judge Goddard was therefore without power, authority or jurisdiction to issue said order of ne exeat.

5. That the only court that could issue a writ or order of ne exeat was the Court of primary jurisdiction, that is, the United States District Court for the Eastern District [fol. 69] of New York, where the bankruptcy proceedings herein were pending.

Wherefore Joseph Popkin prays that the Order be reversed.

Louis Jersawit, Attorney for Joseph Popkin, Petitioner. Office & P. O. address: 150 Broadway, New York City.

Sir: Please take notice that the foregoing is a true copy of an Assignment of Errors duly filed in the office of the Clerk of the United States District Court, Southern District of New York, on the 21st day of March, 1931.

Dated New York, March 21, 1931.

Yours, etc., Louis Jersawit, Attorney for Joseph Popkin, Petitioner. Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

To Leo J. Linder, Attorney for D. Ginsberg & Sons, Inc., Creditor, 67 Wall Street, New York City.

[fol. 70] In United States District Court, Southern District of New York

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated May —, 1931.

Louis Jersawit, Attorney for Appellant. Leo J. Linder, Attorney for Appellee.

[fol. 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt; JOSEPH POPKIN, Appellant

ORDER ALLOWING APPEAL—April 27, 1931

A motion having been made herein by counsel, for the appellant for leave to appeal from a certain order of the District Court dated February 21, 1931,

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 73] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt; JOSEPH POPKIN, Appellant

Before Manton, Swan, and Chase, Circuit Judges

Appeal from the District Court for the Southern District of New York. A creditor, D. Ginsberg & Sons, Inc., obtained a writ of ne exeat against Joseph Popkin, president of the bankrupt corporation. Later an application was made to vacate the writ and the motion was denied. Joseph Popkin appeals. Order reversed.

Louis Jersawit, Esq., Attorney for Appellant.

Leo J. Linder, Esq., Attorney for Creditor-Appellee and Trustee in Bankruptcy, Intervenor.

OPINION

MANTON, Circuit Judge:

The appellee is a creditor of the bankrupt, which was adjudicated such on failure to answer a petition filed against

it on September 23, 1929, in the Eastern District of New York. The trustee qualified June 30th, 1930. Appellee, on [fol. 74] January 27, 1930, procured an order in the Eastern District of New York, for the arrest of the appellant, president of the bankrupt. The order of arrest was based on a petition of Mr. Linder, appellee's attorney, and the affidavit of one Satloff. On December 4, 1930, on the sole petition of the appellee, the bankrupt's trustee not joining therein, a district judge in the Eastern District of New York authorized and empowered the appellee

"To apply to the United States District Court for the Southern District of New York and for the District of New Jersey, and for an ancillary order of examination of such witnesses within the jurisdiction of said courts as may be necessary as to the acts, conduct or property of the bankrupt corporation herein, and for orders ne exeat directed to the Marshals for the Southern District of New York and for the District of New Jersey."

On the same day, appellee on its sole petition, without the trustee joining therein, obtained ex parte, in the Southern District of New York, an ancillary order ne exeat, and an ancillary order for the examination of the appellant before a Special Commissioner in bankruptcy was signed. It was therein ordered

"That the United States Marshal for the Southern District of New York, or any of his deputies, be and he is hereby commanded that, without delay, he apprehend and take into custody Joseph Popkin, an officer of the bankrupt corporation above named, and bring him forthwith before me for examination or, at his option, cause him to give sufficient bail or security in the sum of $10,000 to be approved by this [fol. 75] Court or the Clerk thereof, that he, the said Joseph Popkin, will not depart from or go, or attempt to depart from or go beyond the territorial jurisdiction of this Court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the Court herein for his examination, which shall or may be made on behalf of the said petitioner or other creditor of the said bankrupt."

A warrant of arrest was executed by the Marshal in the Southern District and the appellant taken into custody.

Appellant furnished the required bail and moved to vacate the ancillary order ne exeat. From an order denying this motion, this appeal is taken.

It is conceded that the order ne exeat was made pursuant to such authority as is found in § 2, sub. div. 15 of the Bankruptcy Act. It provides:

"That the Courts of bankruptcy * * * are hereby invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to (15) make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

Neither the court of primary jurisdiction nor the court below of ancillary jurisdiction, has authority to issue such an order unless it be so pursuant to § 9, sub. div. B of the Bankruptcy Act. A writ obtained under § 9, sub. div. B of the Bankruptcy Act requires a petition against a person to be obtained before the expiration of one month after the qualification of the trustee upon satisfactory proof by affi- [fol. 76] davits of at least two persons, that the bankrupt is about to leave the district in which he resides or has his principal place of business and is attempting, by his departure, to avoid examination and defeat the proceedings in bankruptcy. The section also provides for the arrest of the bankrupt and holding under bail for his appearance and examination.

No attempt was made by the appellee to comply with § 9, sub. div. B, and the appellee rests its contention as to the validity of the order on § 2, sub. div. 15, giving authority to the district courts to make such orders, issue such process and enter such judgments provided for and necessary for the enforcement of the provisions of the Bankruptcy Act.

The writ and use of the writ of ne exeat is referred to and limited by § 261 of the Judicial Code in equity proceedings, where it is provided that it may be granted by a judge, "but no writ of ne exeat shall be granted unless a suit in equity in commenced, and satisfactory proof is made the court or judge granting the same that the defendant designs quickly to depart from the United States."

Limitations for permitting such an arrest are made clear by the statute. If the bankrupt is to be taken into custody he may be detained only ten days and he must be arrested upon an order based upon the affidavits of two persons which must show the facts, not opinions, and must be reasonably conclusive. The bankrupt cannot actually be imprisoned within these limitations (Collier on Bankruptcy, [fol. 77] 13th Edition, Vol. 1, p. 390). The writ is punitive in its effect and Congress recognized, by § 9, sub. Div. B of the Act, the high degree of proof necessary upon which to base such a writ. It is to be issued only as an order of arrest with the care that Congress intended. The general authority to issue orders contained in § 2, sub. div. 15, cannot be regarded as extending a writ so specifically granted, to a district judge. The only other statutory authority to issue the writ is § 261 of the Judicial Code which applies to suits in equity and the writ can only be issued against a party defendant.

This writ is intended to be issued against the bankrupt only (In re Hale, Federal Cases, 5911). In the Hale case, Judge Choate said:

"It can hardly be doubted that so great a power, practically reviving imprisonment for debt, and touching so seriously the personal liberty of a very large class of citizens, would, if intended to be given, have been given expressly and not left to be inferred merely from the grant of other powers, and that, if given, its exercise would have been carefully limited by the Act to prevent hardships and abuse. The express grant of the power in one case shows that the attention of the framers of the law was called to the subject, and they are silent as to all other cases. This raises a presumption of some strength against the existence of the power in other cases * * *. And the fact that no provision has been made * * * for a warrant of arrest in any other case than that expressly provided for in the Act indicates the opinion of the Supreme Court that no such remedy is available."

[fol. 78] (See In re Hassenbusch, 108 Fed. 35.)

In the court below, In re Lipke (98 Fed. 970) was referred to, but the question there presented was whether a bankrupt, about to abscond with the assets, can be detained

by a writ, and under the general power of § 2, sub. div. 15, it was ruled that he could, Judge Brown said:

"The necessity of the occasional exercise of this power for the efficient administration of the Bankruptcy Law is evident. Without it the bankrupt might easily defy and largely nullify all adverse proceedings against him by absconding with his assets."

In re Cohen (136 Fed. 999) and the Matter of Berkowitz (173 Fed. 1012) to which our attention is also called, both district court cases, we think disregard the limitations of § 9, sub. div. B, and erroneously hold the power did exist to issue the writ of ne exeat under § 2, sub. div. 15. However, in both instances, the writ was against the bankrupt. We think it better to follow the apparent intent of Congress to permit the writ to issue when and as specifically granted under § 9, sub. div. B, and when the terms of that section are complied with.

Moreover, there is no provision in § 9 sub. div. B, which vested jurisdiction or authority in the court below to issue a writ of ne exeat against an officer of a bankrupt corporation. And there is no inherent power to issue such an order and thus hold him to be examined concerning the acts of the bankrupt. Congress by the general provision of § 2, sub. div. 15, did not intend the issuance of orders of arrest, for, at the same time, by § 9B, it provided specific requirements before arrests might be granted. An officer of a bankrupt corporation is not the bankrupt (Kaufman [fol. 79] v. United States, 212 Fed. 613). The section is without application to him. Congress recognized this in prescribing punishment for crime (§ 29b) under the Bankruptcy Act. Such a drastic remedy as an arrest provided for by § 9(b) of the Bankruptcy Act is one directed against the liberty of a person and should be strictly construed and carefully applied (In re Schenkein, 113 Fed. 421). It is the bankrupt, not an officer, who is referred to as subject to arrest in § 9(b). It was intended to be issued only against the bankrupt, not a third party. If an officer of the corporation fails to appear for examination under § 21(a) of the Act, or becomes a recalcitrant witness, he may be punished for contempt. This remedy is ample; at least it is all Congress has provided.

Another sufficient reason why the order was improperly granted below is the fact that it was applied for a by creditor and not the trustee in bankruptcy. (In re Lewensohn, 121 Fed. 538 [C. C. A. 2].) There the court said:

"The trustee represents every creditor * * *. If the trustee should, without sufficient reason, refuse to proceed, the Court, by its order, could compel him to do so, or remove him for disobedience. It has been held under the present Act that a creditor cannot prosecute an appeal from the judgment of a court of bankruptcy allowing the claim of another creditor, and that the trustee is the only party who can do so."

See, also, In re Rogers Johnson Bldg. Co. (30 Fed. [2d] [fols. 80 & 80½] 359). While the trustee is serving as such, any controversy arising out of and connected with the bankrupt's estate must be instituted by the trustee, for no useful purpose can be served by a creditor's duplication. Any other interpretation of the act would leave the bankrupt at the mercy of every creditor for his real or fancied wrongs. The creditor cannot usurp the power conferred upon the trustee while the trustee is in office.

Order reversed and motion to vacate granted.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of FOSTER CONSTRUCTION CORPORATION, Bankrupt; JOSEPH POPKIN, Appellant

JUDGMENT—Filed July 1, 1931

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court

be, and it hereby is, reversed, with costs and the court below directed to grant the motion to vacate.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 82] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 83] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 2, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,243. U. S. Circuit Court of Appeals, Second Circuit. Term No. 429. D. Ginsberg & Sons, Inc., petitioner, vs. Joseph Popkin. Petition for a writ of certiorari and exhibit thereto. Filed October 1, 1931. File No. 36,243.